

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDDIE PERKINS,

Defendant-Appellant.

UNPUBLISHED

October 23, 2003

No. 235921

Wayne Circuit Court

LC No. 00-012237

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDDIE PERKINS,

Defendant-Appellant.

No. 235922

Wayne Circuit Court

LC No. 00-009645

Before: Murphy, P.J., and Cooper and C. L. Levin*, JJ.

PER CURIAM.

Following a jury trial,¹ defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a); assault with intent to commit murder, MCL 750.83; and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent terms of life imprisonment for the first-degree murder conviction and thirty to sixty years' imprisonment for the assault conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

¹ Defendant was tried jointly with Larry Hollie and Shawn Davis. Defendant and Hollie were tried before a single jury, but Davis had a separate jury.

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

I. Facts

On August 4, 2000, Larry Hollie was driving a black vehicle in which defendant, Shawn Davis, and Derrick Fowler were passengers. Hollie drove up to a parked vehicle occupied by two strangers, James McCrary and Bruce Cooper. After speaking with Akeia Williams, an acquaintance who was standing outside the vehicles, Hollie asked McCrary if he could look at his vehicle's engine. When McCrary agreed, Hollie and his three passengers exited their vehicle armed with handguns and long guns. Witnesses identified defendant as being armed with two handguns, and claimed that he shot both McCrary and Cooper in their legs through the T-top of McCrary's vehicle. Cooper testified that he was able to crawl out of McCrary's vehicle after being shot in the leg. He stated that he positioned his head under the vehicle because he feared being shot in the head. McCrary pleaded for the four men not to kill them. Multiple gunshots were then fired. Cooper received four more gunshots. An autopsy revealed that McCrary sustained nineteen gunshot wounds. McCrary died from his injuries.

Defendant and his accomplices fled the area in the black vehicle. Shortly thereafter, police officers observed the black vehicle disregard a stop sign and gave chase. During the chase, one officer noticed an object being tossed from the black vehicle. Upon further investigation of that area, the police discovered a nine-millimeter semi-automatic handgun. The driver of the black vehicle eventually lost control of the vehicle and crashed. Defendant was arrested after he was observed fleeing from the black vehicle. The police confiscated a rifle that was located on the ground by the black vehicle. A firearms identification expert testified that casings taken from the handgun and the rifle matched some of the casings found in the vicinity of McCrary's vehicle.

II. Co-defendant's Statement

Defendant initially argues that he is entitled to a new trial because a redacted version of Hollie's statement to the police was admitted as substantive evidence against defendant. While we agree that the statement was not substantively admissible against defendant, we find any error in this regard to be harmless.

We initially note defense counsel's affirmative approval of the form and admission of the redacted statement at trial. "A defendant may not waive objection to an issue before the trial court and then raise the issue as an error on appeal."² Our review in this case is therefore limited to defendant's related claim that the trial court erroneously denied defense counsel's request for a limiting instruction.

Claims of instructional error are reviewed de novo on appeal.³ On the record before us, we find that the trial court erroneously refused to give a limiting instruction on this issue. A nontestifying codefendant's statement is only substantively admissible against a defendant in a joint trial if the statement satisfies the evidentiary rules governing hearsay and protects the

² *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001).

³ *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

defendant's constitutional right of confrontation.⁴ If a codefendant's statement is not substantively admissible against the defendant, redaction of the codefendant's statement to eliminate references to the defendant, *combined with an appropriate limiting instruction*, may be an appropriate means for rectifying potential prejudice to the defendant.⁵ Here, the trial court denied defendant's request for a limiting instruction because it concluded that Hollie's redacted statement was substantively admissible against defendant. This was clear error, as the prosecutor offered neither an evidentiary nor constitutional foundation for the substantive admission of Hollie's statement against defendant.⁶

Because defendant's right of confrontation was affected by the trial court's ruling, we treat this issue as a preserved, constitutional error.⁷ The erroneous admission of a codefendant's statement as substantive evidence against a defendant is subject to the federal harmless-error analysis.⁸ An error is considered harmless if the prosecutor proves beyond a reasonable doubt that it did not contribute to defendant's conviction.⁹ As explained in *People v Whitehead*, "[t]he properly admitted evidence must be 'quantitatively assessed' to determine whether, had the improperly admitted evidence not been presented at trial, there is any 'reasonable possibility' that a factfinder would have acquitted."¹⁰

The fact that the jury asked the trial court if they could take Hollie's unsigned statement into account indicates that they considered it during their deliberations. But our inquiry does not end here, as we must further examine this evidence in light of the evidence that was properly admitted at trial. The record in this case revealed that defendant was seen fleeing from a black vehicle shortly after the shooting occurred. A rifle recovered near this vehicle was determined to have fired some of the bullets found at the scene of the shooting. More importantly, several trial witnesses identified defendant as an armed perpetrator who participated in the assault. We also note that Hollie's redacted statement neither suggested defendant's identity as a perpetrator, nor provided information about what role, if any, he may have had during the shooting. In light of this overwhelming evidence, we find there is no reasonable possibility that a factfinder would have acquitted defendant absent the admission of Hollie's redacted statement as substantive evidence against defendant.¹¹

⁴ *People v Poole*, 444 Mich 151, 157; 506 NW2d 505 (1993).

⁵ See *People v Etheridge*, 196 Mich App 43, 47-51; 492 NW2d 490 (1992).

⁶ See MRE 105.

⁷ See *People v Anderson (After Remand)*, 446 Mich 392, 404-406; 521 NW2d 538 (1994).

⁸ *People v Banks*, 438 Mich 408, 427; 475 NW2d 769 (1991).

⁹ *People v Tanner*, 255 Mich App 369, 400; 660 NW2d 746 (2003).

¹⁰ *People v Whitehead*, 238 Mich App 1, 9; 604 NW2d 737 (1999); see also *People v Mass*, 464 Mich 615, 640, n 29; 628 NW2d 540 (2001).

¹¹ See *Whitehead*, *supra* at 12-13.

III. Prosecutorial Misconduct

Defendant next asserts that he was deprived of a fair trial because of misconduct by the prosecutor. We disagree. Prosecutorial misconduct claims are reviewed case by case, examining any remarks in context, to determine if the defendant received a fair and impartial trial.¹² Because defendant failed to object to this alleged misconduct, our review is limited to plain error affecting his substantial rights.¹³ “No error requiring reversal will be found if the prejudicial effect of the prosecutor’s comments could have been cured by a timely instruction.”¹⁴

Defendant first claims that the prosecutor improperly used voir dire to condition the prospective jurors, provide instructions on his view of the law, and to infringe on defendant’s right to remain silent. A review of the record shows that the prosecutor never suggested that his hypothetical example was the factual basis of this case and defendant does not argue on appeal that the prosecutor misstated the law. We also find no merit to defendant’s claim that the prosecutor improperly commented on defendant’s Fifth Amendment right to remain silent.¹⁵ Here, the record reflects that the prosecutor, without objection, merely conveyed that defendant could not be called as a witness by the prosecution in the course of questioning the jury venire about their understanding of whether the prosecution needed to establish motive. The prosecutor was silent with regard to whether defendant would or would not testify on his own behalf.

Defendant also raises several instances of alleged misconduct during the prosecutor’s opening and closing remarks. A prosecutor may not vouch for the credibility of a witness by conveying that he has some special knowledge that the witness is testifying truthfully, or express his personal opinion about the defendant’s guilt.¹⁶ If the jury is faced with a credibility question, however, the prosecutor is free to argue a witness’ credibility from the evidence.¹⁷ Examining the prosecutor’s comments in context, it is not plainly apparent to this Court that the prosecutor improperly vouched for evidence, witnesses, or defendant’s guilt.¹⁸ Rather, the prosecutor permissibly argued that the evidence supported a finding that defendant was guilty as charged.

Defendant further opines that the prosecution argued facts not in evidence during its closing argument. A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence.¹⁹ But a prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case.²⁰ Absent an objection, the trial court’s

¹² *Aldrich*, *supra* at 110.

¹³ *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

¹⁴ *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

¹⁵ See *Griffin v California*, 380 US 609; 85 S Ct 1229; 14 L Ed 2d 106 (1965).

¹⁶ *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001).

¹⁷ *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

¹⁸ *Schutte*, *supra* at 722.

¹⁹ *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994).

²⁰ *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996).

instruction to the jury that “the lawyers’ statements and arguments are not evidence” was sufficient to dispel any prejudice.²¹ Juries are presumed to follow their instructions.²²

The prosecutor’s remarks concerning “justice” and the defendants being “murderers in our midst” who will soon be in the jurors’ charge, were not so overwhelming that they would have caused the jurors to suspend their powers of judgment in favor of a civic duty.²³ Whether defendant’s claims of misconduct are examined singularly or cumulatively, we conclude that defendant has failed to show that he was deprived of a fair trial.²⁴

IV. DNA Expert

Defendant also challenges the trial court’s refusal to appoint a defense expert to reanalyze DNA material found on certain clothing items. He claims that this refusal deprived him of a right to present a defense and a fair trial. We disagree. A trial court’s decision to adjourn trial or appoint a DNA expert for a defendant is reviewable for an abuse of discretion.²⁵

The right to present a defense is not absolute and may be limited by procedural and evidentiary rules designed to assure fairness and reliability in the verdict.²⁶ In this case, the trial court acted within its discretion when it decided to appoint a DNA expert for defendant to review the DNA test results, rather than order a midtrial adjournment for retesting. Giving due regard to the circumstantial nature of the challenged evidence, the record fails to show that defendant could not safely proceed at trial without independent DNA retesting.²⁷ Indeed, we note that defendant ultimately chose to recall the prosecutor’s DNA expert as a defense witness rather than his own expert. Defendant was also able to establish that in addition to defendant, the homicide victim, McCrary, could not be ruled out as a contributor to the DNA material found on the clothing items. Notably, these clothing items were not found at the crime scene or linked to the shooting itself; rather, they were seized from the black vehicle following the police chase.

The record does not support defendant’s claim that the appointment of the defense expert was a sham. And defendant’s mere assertion that scientific reliability generally requires a replication of results is insufficient to establish error. An appellant may not merely announce a position and leave it to this Court to discover and rationalize the basis for his claim.²⁸ Giving due consideration to the applicable procedural and evidentiary rules underlying defendant’s

²¹ *Schutte, supra* at 721-722.

²² *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

²³ *People v Crawford*, 187 Mich App 344, 354; 467 NW2d 818 (1991).

²⁴ *People v Rice (On Remand)*, 235 Mich App 429, 434-435; 597 NW2d 843 (1999).

²⁵ *People v Jackson*, 467 Mich 272, 276; 650 NW2d 665 (2002); *People v Herndon*, 246 Mich App 371, 398-399; 633 NW2d 376 (2001).

²⁶ *People v Toma*, 462 Mich 281, 294; 613 NW2d 694 (2000).

²⁷ *Tanner, supra* at 398.

²⁸ *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

claim, we conclude that defendant has not shown error. The trial court's refusal to appoint a DNA expert for retesting did not deprive defendant of his constitutional right to present a defense.

V. Discovery Order Violation

We similarly reject defendant's argument that the prosecutor's DNA evidence should have been excluded as a sanction for violating a discovery order. Because defendant failed to preserve this issue by moving to exclude the DNA evidence on this specific ground at trial, our review is limited to plain error affecting his substantial rights.²⁹ Defendant has failed to show a discovery violation by the prosecutor in this regard and we find no basis for relief. The record reveals that the prosecution provided defendant with the expert's report shortly after it was completed. We further note that a trial court is afforded discretion in fashioning an appropriate sanction for a discovery violation.³⁰

VI. Ineffective Assistance of Counsel

Defendant next seeks either a new trial or a remand for a hearing pursuant to *People v Ginther*,³¹ on the grounds that he was denied the effective assistance of counsel. A panel of this Court previously denied defendant's motion to remand for failure to persuade this Court of the necessity for a remand. After reviewing the record, we are likewise unpersuaded that appellate relief is warranted.³²

Limiting our review to the record, we reject defendant's claim that defense counsel was ineffective for failing to object to the admission of Hollie's redacted statement.³³ The use of neutral pronouns was an appropriate means of redacting Hollie's statement to avoid any prejudice to defendant.³⁴ More importantly, we note that defense counsel requested that the trial court provide a limiting instruction to the jury on the use of this statement. While the trial court ultimately erred by refusing to give such an instruction, as we previously held, the error did not contribute to the jury's verdict against defendant.³⁵

Defense counsel's failure to request exclusion of the DNA evidence under MRE 401 or MRE 403 also affords no basis for a new trial. Even if a motion would have been successful, given the minimal probative value of the DNA evidence in comparison to the eyewitness

²⁹ *Carines*, *supra* at 763-764; see also *People v Maleski*, 220 Mich App 518, 523; 560 NW2d 71 (1996).

³⁰ *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997).

³¹ *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973).

³² See *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

³³ See *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

³⁴ *Etheridge*, *supra* at 47-51.

³⁵ See *Carbin*, *supra* at 600 (holding that a defendant must establish prejudice as a result of counsel's actions).

testimony establishing defendant's guilt, it is not reasonably probable that the result of the trial would have been different.³⁶

Further, it is not apparent from the record that defense counsel was deficient in his investigation and advancement of the defense of misidentification. Decisions regarding whether to call witnesses are presumed to be matters of trial strategy.³⁷ Here, the record is silent regarding whether defense counsel investigated the possibility of presenting an expert witness on eyewitness identification. In any event, the record does not reflect that such an expert witness was necessary for defendant to safely proceed to trial.³⁸ We note that defense counsel challenged the accuracy of the eyewitness identifications during cross-examinations.

Defendant ultimately claims that his counsel was ineffective for failing to move to suppress the in-court identifications made by Larry Speight and Cooper. The record, however, does not indicate that such a motion would have been successful. Speight's trial testimony reflected that he saw defendant in court on a prior occasion, but does not indicate that he was subjected to a prior identification procedure, suggestive or otherwise, when he saw defendant.³⁹ Cooper's trial testimony reflected that he previously identified defendant at a preliminary examination. Not all preliminary examination confrontations, however, are unduly suggestive.⁴⁰ Considering the totality of the circumstances surrounding the shooting, it is not apparent that Cooper lacked an independent basis for his in-court identification of defendant.⁴¹ Defense counsel is not required to advance a meritless position.⁴²

VII. Reasonable Doubt Jury Instruction

Defendant further posits that he was denied a fair trial because the trial court improperly instructed the jury on reasonable doubt. The trial court did not commit plain error by instructing the jury on reasonable doubt by reading CJI2d 3.2(3) verbatim.⁴³

VIII. Adjournment

Defendant next asserts that he was denied his right to a fair and impartial jury when the trial court adjourned the trial for approximately one week to accommodate a planned vacation. Because defendant did not object to the adjournment our review is again limited to plain error

³⁶ *Id.*

³⁷ *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

³⁸ *Tanner*, *supra* at 398; see also *People v Carson*, 217 Mich App 801, 806-807; 553 NW2d 1 (1996), as adopted by *People v Carson*, 220 Mich App 662, 678; 560 NW2d 657 (1996).

³⁹ See *People v Kurylczuk*, 443 Mich 289, 302; 505 NW2d 528 (1993).

⁴⁰ *People v Hampton*, 138 Mich App 235, 238; 361 NW2d 3 (1984).

⁴¹ See *Kurylczuk*, *supra* at 302-303.

⁴² *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

⁴³ *People v Hubbard (After Remand)*, 217 Mich App 459, 487-488; 552 NW2d 493 (1996).

affecting his substantial rights.⁴⁴ And on the record before us we find no plain error. The challenged delay did not preclude a fair determination of the charges against defendant. To the contrary, the delay afforded defendant an opportunity to further review the DNA evidence with his independent DNA expert. Defendant's speculative claim of prejudice fails to present a basis for relief.⁴⁵ An adjournment of trial, even if ordered to accommodate the trial court rather than the parties, does not amount to structural error.⁴⁶

IX. Sufficiency of the Evidence

Defendant next argues that the evidence was insufficient to support his conviction of first-degree murder. Specifically, he asserts that the prosecution failed to present sufficient evidence to support a finding of premeditation. We disagree. In sufficiency of the evidence claims, this Court reviews the evidence in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.⁴⁷

Premeditation and deliberation are essential elements of first-degree murder.⁴⁸ To premeditate means that a person was able to think about an action beforehand.⁴⁹ But deliberation requires a person to measure and evaluate the major facets of a problem or choice.⁵⁰ Both require sufficient time to allow the defendant to take a second look.⁵¹ Circumstantial evidence may constitute sufficient proof of premeditation and deliberation.⁵² There is also no requirement that a prosecutor negate every reasonable theory consistent with innocence.⁵³

Viewing the evidence in the light most favorable to the prosecution, we believe that a rational finder of fact could conclude that defendant and his accomplices were acting pursuant to a preconceived plan to kill McCrary and Cooper. The nature of their plan is evidenced by defendant's conduct in disabling McCrary and Cooper by first shooting them in their legs. Defendant clearly had an opportunity to take a second look at his actions as Cooper crawled out of the vehicle and McCrary pleaded for their lives. This evidence was sufficient to sustain defendant's conviction of first-degree premeditated murder.

⁴⁴ *Carines, supra* at 763-764.

⁴⁵ *United States v Vigneau*, 187 F3d 70, 82 (CA 1, 1999).

⁴⁶ See *People v Duncan*, 462 Mich 47, 51-52; 610 NW2d 551 (2000).

⁴⁷ *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002).

⁴⁸ *People v Plummer*, 229 Mich App 293, 299, 301; 581 NW2d 753 (1998).

⁴⁹ *Id.* at 300, citing *People v Morrin*, 31 Mich App 301, 329-331; 187 NW2d 434 (1971).

⁵⁰ *Plummer, supra* at 300.

⁵¹ *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998).

⁵² *Herndon, supra* at 415.

⁵³ *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

X. Cumulative Error Doctrine

Defendant also contends that the cumulative effect of these alleged errors necessitates reversal. Because there were no errors of consequence which combined to deprive defendant of a fair trial, the cumulative error doctrine is inapplicable in this case.⁵⁴

XI. Sentencing

Defendant ultimately challenges the trial court's decision to depart from the sentencing guidelines when it sentenced him to thirty to sixty years for assault with intent to commit murder. Even if the trial court's reasons for departing from the recommended range under the sentencing guidelines failed to comply with the standards delineated in MCL 769.34(3), we conclude that resentencing is not warranted in light of our affirmance of defendant's lengthier concurrent sentence of life imprisonment without parole.⁵⁵

Affirmed.

/s/ William B. Murphy

/s/ Jessica R. Cooper

/s/ Charles L. Levin

⁵⁴ *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999).

⁵⁵ Cf. *People v Sharp*, 192 Mich App 501, 506; 481 NW2d 773 (1992); see also *People v Passeno*, 195 Mich App 91, 102; 489 NW2d 152 (1992), overruled on other grounds in *People v Bigelow*, 229 Mich App 218; 581 NW2d 744 (1998).